BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHY G. JONES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,965
ALCOA AEROSPACE CENTER	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 9, 2007 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was awarded medical treatment with Paul S. Stein, M.D., as the authorized treating physician after the Administrative Law Judge (ALJ) found that claimant had aggravated her cervical injuries with her work activities in February and March 2007. The ALJ determined that the alleged injury in January 2007 was not related to claimant's ongoing physical complaints and the alleged fall in February 2007 failed due to a lack of timely notice on claimant's part.

Claimant appeared by her attorney, Larry A. Bolton of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Steven Marsh of Wichita, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the discovery deposition of Kathy G. Jones taken June 29, 2007; the transcript of Preliminary Hearing held July 5, 2007, with attached exhibits; the evidentiary deposition of Jason Flores taken July 19, 2007, with attached exhibits; the evidentiary deposition of Duane Banning taken July 19, 2007, with attached exhibits; the evidentiary deposition of Karen Bell taken July 19, 2007, with attached exhibits; the deposition of Samuel T. Bass taken August 6, 2007; the evidentiary deposition of Daniel Hornbeck taken August 16, 2007; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident on January 8, 2007, on an unidentified date in February 2007, and/or through a series of microtraumas from January 8, 2007, through March 26, 2007, which arose out of and in the course of her employment with respondent?

2. Did claimant provide timely notice of her alleged accidents?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant alleges three separate incidents which led to her need for medical treatment for her neck and right upper extremity. The first accident occurred on January 8, 2007, when claimant fell while pushing a skid. Claimant told her supervisor, Jason Flores, of the incident but did not indicate any injury resulted. Mr. Flores did acknowledge that claimant had a knot on her knee the next day. An IFE (injury free event) form was completed and an investigation followed. Claimant neither requested nor received medical treatment after this incident. While there was, clearly, notice of this incident, there is no support in this record that the January fall led to claimant's current need for treatment. The ALJ found, and this Board Member agrees, that claimant's current complaints are not related to this fall on January 8, 2007.

Claimant also testified to a fall in February 2007. The exact date of this fall is not clear in this record. What is clear is that claimant did not tell respondent of this injury for a substantial period of time. The only person she reported this injury to was her co-worker and friend, Sam Bass. Claimant did indicate at that time that her shoulder and neck were bothering her. The ALJ determined that claimant failed to provide timely notice of this accident.

Claimant also alleges a series of mini-traumas through March 26, 2007. On March 26, claimant was helping three of her co-workers move a heavy skid. After helping move the skid, claimant experienced an increase in her neck and arm pain. This was reported to Mr. Flores and also to Duane Banning, respondent's environmental health and safety engineer. Mr. Banning testified that four people, of which claimant was one, pushed a scrap cart on the 26th and that shortly after, claimant came to Mr. Flores and stated that she was sore and needed to go home.[1] Mr. Flores also testified to the events of March 26,

[1] Banning Depo. at 9.

stating that claimant came to him after helping push the cart and asked to go home early. She had "basically over-exerted herself"[2] and needed to go home for the rest of the night. Claimant told Mr. Flores that either her shoulder or neck was sore.[3]

This record is replete with contradictory information. Claimant's testimony is, at times, contradictory and conflicting. At the end of the preliminary hearing, the ALJ was uncertain as to claimant's injuries and their relation to her work with respondent. He referred claimant to board certified neurological surgeon Paul S. Stein, M.D., for an independent medical examination on October 22, 2007. The report indicates claimant's incident on February [*sic*] 26 or 27 increased claimant's symptomatology. It is noted that this record contains no evidence of an injury on February 26 or 27 and the report of Dr. Stein also discusses an incident on March 26 or 27. This Board Member agrees with claimant that this is a typographical error by the doctor. Dr. Stein does go on to state that, "It is medically consistent for Ms. Jones to have an increase in cervical spine symptomatology when pushing a heavy skid as such activity would put a significant strain on this anatomic area."[4]

Exhibit 1A from the deposition of Karen Bell, respondent's human resource manager, is a Missed Time Form prepared on March 27, 2007, and signed by claimant. One question on the form asks the "Nature of illness (be specific)." The written response next to this inquiry states "aggravated herniated disc".

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[2] Flores Depo. at 13.

[3] *Id*. at 14.

[4] Stein IME report at 7.

[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

This record supports claimant's contention that she suffered an accident on January 8, 2007. But, as the ALJ noted, there is no evidence of any injury from this incident. Claimant sought no medical treatment, and the medical information in this record does not support a finding of any injury, temporary or otherwise. This Board Member affirms the ALJ's finding that claimant's current complaints are not attributable to the January fall.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[9]

Claimant's report of the accident in February 2007 to her co-worker does not constitute notice to respondent. There is no indication in this record that claimant provided notice to any supervisor regarding this slip and fall. While it is uncontradicted that the incident happened and uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy,[10] claimant's description of the accident does not aid her request for benefits without the notice requirement also being satisfied. And this record does not support such a finding.

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[7] K.S.A. 2006 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] K.S.A. 44-520.

[10] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[11]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.[12]

Claimant's testimony about the incident on March 26, 2007, coupled with the testimonies of Mr. Flores and Mr. Banning, with the addition of the Missed Time Form, detailing the herniated disc, convinces this Board Member that the incident on that date, at the very least, aggravated claimant's cervical injury. In workers compensation litigation in Kansas, an aggravation is all that is needed to make an injury compensable. The award of benefits by the ALJ for that injury is appropriate. The discussion of the incident and resulting injury with her supervisor and the safety coordinator for respondent, and the decision for claimant to go home early on that same day eliminate any consideration of a timely notice dispute for the March 26, 2007 injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The ALJ properly determined that claimant failed to show any injury resulting from the January 8, 2007 accident, that claimant failed to provide timely notice of the alleged accident in February 2007, and the denial of benefits for those alleged injuries and injury dates is affirmed. The determination that claimant, at least temporarily, aggravated her cervical injuries during the pushing incident on March 26, 2007, is also supported by this record and is affirmed.

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[11] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[12] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[13] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 9, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

HONORABLE GARY M. KORTE

c: Larry A. Bolton, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge